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In re Application of
Herbert E. Schwartz
Application No. 10/598,223
Filed: August 22, 2006
Attorney Docket No. 3124.006A

: **OFFICE OF PETITIONS**
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: **DECISION ON PETITION**
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This is a decision on the petition under the unavoidable provisions of 37 CFR 1.137(a), filed October 4, 2010, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned for failure to reply in a timely manner to the final Office action mailed January 5, 2010 (an advisory action was mailed on September 21, 2010). A Notice of Abandonment was mailed on November 12, 2010.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

Petitioner states that: The basis for this Petition is that the Office Action made Final mailed January 5, 2010 was not so-identified on its cover page. As a result, despite the Applicant's representative sophisticated system of Office Action review and docketing and the Applicant's bona fide attempt to advance this application to allowance, the Applicant's representative was unaware of the July 5, 2010 six-month deadline to avoid abandonment."

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

While it is true that the Office Action Summary cover sheet of the Final Office Action mailed January 5, 2010, indicated in box 2b that "This action is non-final", instead of box 2a to state that "This action is **FINAL**", the applicant was made aware in the body of the Office action on page 7 (seven) in the Conclusion in **bold** in paragraphs 13 (thirteen) and 14 (fourteen), "**THIS ACTION IS MADE FINAL**". Therefore, applicant knew that the Office action mailed January 5, 2010 was a final Office action. Further, applicant responded to the Office action on May 5, 2010, to show that a review of the Office action had been made by applicant. In order to have responded to the Office action mailed January 5, 2010, applicant had to recognize page 7(seven) of the Office action.

In view of the above, the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 35 U.S.C. § 1.33 and 37 CFR 1.137(a).

If petitioner cannot provide the evidence necessary to establish unavoidable delay, or simply does not wish to, petitioner may wish to consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was “unavoidable.” This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An “unintentional” petition under 37 CFR 1.137(b) must be accompanied by the \$1,620.00 petition fee or \$810.00 at the small entity rate.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be delivered through one of the following mediums:

By mail: Mail Stop PETITIONS
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By hand: Customer Service Window
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 Randolph Building
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 Alexandria, VA 22314

By fax: (571) 273-8300
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By internet: EFS-Web
 www.uspto.gov/ebs/efs_help.html
 (for help using EFS-Web call the
 Patent Electronic Business Center
 at (866) 217-9197)

Any questions concerning this matter may be directed to the undersigned at (571) 272-3208.

/KOC/
Karen Creasy
Petitions Examiner
Office of Petitions